section (4) (i) (c) of the Common Gaming Houses Enactment.

On 19th April, 1948, the O.C.P.D. Raub, received certain information and in consequence thereof searched the premises of the appellant and found therein 388 documents, with Chinese characters thereon. None of these appears to have been translated; but the Chinese interpreter of the Supreme Court, Raub, purporting to give evidence as an expert on the subject of lotteries, stated that they were "the proof of the drawing in the pigeon lottery". This seems to me quite inadequate. I doubt if this witness was an expert. If he was, he gave no such evidence as should have satisfied the Court as to the existence or nature of a 120 character or pigeon lottery, or of the nature of these documents.

The particulars of the charge alleged "possession of 388 — 120 character lottery tickets". The expert evidence went to show that, whatever these documents were, they were not lottery tickets. The charge was then amended to allege "possession of 388 memoranda relating to 120 character lottery". This is still open to serious objection. It is evidently designed to conform to the wording of section 11 of the Enactment; but entirely fails to do so, for the words "account, memorandum or record" in that section are all qualified by the whole phrase "of stakes or wagers in or relating to a lottery". It is not enough that the document should be "a memorandum relating to a lottery". It must be a "memorandum of stakes or wagers in or relating to a lottery". The section in effect covers two things: first, lottery tickets themselves, and secondly, the record, normally kept by a promoter or participant, of the money stakes in a lottery, or, so to speak, the list of numbers taken.

It is certainly not proved that the 388 documents were of this nature. The evidence seems to indicate that they were something quite different — perhaps a sort of record of drawings from which winning bets could be identified. Such a document would not, or at least need not, be within the terms of section 11.

A further point is that, although the O.C.P.D. Raub is duly gazetted as a senior police officer for the purposes of the Enactment, the search during which the documents were discovered is not proved to have been made in accordance with the requirements of section 18. The importance of this point *in some cases* is clearly established by a long line of decisions culminating in *Public Prosecutor v. Eng Lim & ors.*[1]. It is only after an entry on premises, strictly proved to have been effected in precise compliance with the section, that any presumption can arise under section 19 that premises are a common gaming house, or thereafter under section 6 that persons therein were gaming. It does not appear, however, that the same considerations apply as regards presumptions under section 11. It is true that the entry and search may have been illegal and a trespass: but in section 19 the wording is "found in any place entered under this Enactment", (i.e. lawfully entered in accordance with section 16 or section 18), while section 11 requires only that a person should be "found in possession". I think therefore that it was not necessary that the "finding in possession" should occur in the course of a lawful entry and search. If these documents were proved to be "memoranda of stakes or wagers in or relating to a lottery" and were also proved to have been found in the possession of the appellant, I think the presumption under section 11 would arise, although the manner of their discovery may have been unlawful. But the first of these two points was *not* proved.

I am inclined to think there was evidence from which the learned District Judge could properly infer possession: but this point has no further relevance.

There is nothing in the document themselves (so far as the evidence goes) to indicate a public lottery then in progress, and it may well be perfectly true that these documents related only to lotteries which were conducted during the Japanese occupation, when they were apparently perfectly legal.

The conviction and sentence are set aside and the fine is to be refunded.

Appeal allowed.

KHOO BOO GONG v. MANSON-HING

[C. A. (Jobling, Laville and Russell JJ.)
August 19, 1948]

[K. L. — F.M. Civil Appeal No. 23 of 1947]

Appeal — Finding of fact by trial Court — Whether such a finding can be upset by an appellate Court — Claim for professional services as an Architect.

This was an appeal from the decision of the learned Chief Justice of the Federation of Malaya who decided that the respondent was entitled to recover the sum of $1,521.72 under a specific agreement for work done by the respondent who claimed to be an architect and civil engineer. The appeal was brought solely on the ground that the findings of fact by the learned trial Judge were against the weight of the evidence.

Held: (1) in the circumstances of this case the Appellate Court was free to examine the whole of the evidence in the light of facts brought to its notice, which facts did not appear to have been brought to the notice of and were not referred to by the learned trial Judge in his judgment; (2) on a review of the evidence and of the conduct of the respondent it was clear that his story could not be believed and that he had failed to discharge the onus of proving his claim.

Cases referred to:—

(1) *Manson-Hing v. Ho Ah Loke* (1949) M.L.J. 37.

(2) *Gibbon v. Pease* (1905) 1 K.B. 810.

(3) *Watt v. Thomas* (1947) A.C. 484.

Willan C.J. (as trial Judge) : — In this case the plaintiff claims, as an architect, the sum of $2,742.54 from the defendant for plans prepared by him in respect of the premises No. 9 Treacher Road, Kuala Lumpur (hereinafter in this judgment referred to as "the premises").

That claim is made up as follows :—

(A)	Fee for making a schedule of dilapidations and providing a drawing. 10 per cent of agreed cost $7,854.84	$ 785.48
(B)	Fee for preparing drawing relating to renovations. 2/3 of 10% of $27,720 ...	1,848.00
(C)	Fee for preparing drawing for reinforced concrete water tank. 2/3 of 13% of $3,700	320.66
		$2,954.14

In addition to that total sum of $2,954.14 the plaintiff claims $85.40 disbursements, and gives the defendant credit for the sum of $297 — part payment — leaving, as he claims, a final total amount of $2,742.54 due from the defendant to him.

Briefly, the plaintiff's claim is based on the following :—

(1) That on the 9th of November, 1945, the defendant instructed him to prepare a schedule showing estimated cost of repairing dilapidations of the premises and a working drawing from which a contractor could execute the work. The reason for this was that another Chinese had been in occupation of the premises during the Japanese occupation and had used the premises for a distillery with consequential dilapidations. That the defendant required the said schedule and working drawing in order to have the dilapidations repaired so that he could make a claim against that other Chinese. Fee for schedule and working drawing fixed at 10% agreed cost.

(2) That on the 23rd November, 1945, the defendant instructed the plaintiff to prepare completely new plans for the purpose of renovating the premises instead of proceeding with the repair of dilapidations. That the new plans were accordingly prepared, approved and signed by the defendant, passed by the Town Board, Kuala Lumpur, tenders called for and received, and that after the receipt of such tenders the defendant abandoned the project. Fee claimed by the plaintiff is on the basis that the work was abandoned, and thus his claim is 2/3rds of 10% of $27,720 — the figure of $27,720 being the average of the four lowest tenders.

(3) That after abandoning the work mentioned in (2) above the defendant had the premises repaired by some one else, using the plaintiff's dilapidations plan for so doing.

(4) That the plaintiff prepared a plan for the defendant for a water tank; that the defendant abandoned this project. Fee claimed 2/3rds of 13% of estimated cost of $3,700.

The defendant's evidence can be summed up as follows :—

(a) He admits he instructed the plaintiff to prepare schedule and plan for repair of dilapidations but that the fee agreed upon was 5 per cent of agreed cost. Half fee payable on completion of plan and the other half payable when his claim against the Chinese, who occupied the premises during the Japanese occupation, was settled. A further 5 per cent payable to plaintiff for supervising the work when done.

(b) That the plaintiff, himself, suggested the abandonment of repairing the dilapidations and suggested the renovation scheme instead. That there was a novation of the original contract i.e. the contract for the preparation of the schedule and plan for repairing the dilapidations, in that it was agreed between the plaintiff and defendant that the plaintiff would accept, and did accept, $150 in full settlement of his fee for preparing the schedule and plan for repairing the dilapidations and, in addition, the plaintiff agreed to accept, and did accept, a fee of $100 for preparing the renovations plan.

[**Note:** It is admitted by both plaintiff and defendant that the defendant reimbursed the plaintiff for the $42, which the latter had paid as a fee to the Town Board, Kuala Lumpur, in respect of the Town Board passing the renovations plan signed by the defendant, and submitted to that Board by the plaintiff on behalf of the defendant. It is further admitted by the defendant that he has not paid; and should have paid, the plaintiff the sum of $38.40 in respect of blue prints of that renovations plan.]

The issues in this case are solely matters of fact. Before proceeding to decide those issues of fact I ought to state that although the defendant is a tin miner by profession he is well acquainted with the building trade in Kuala Lumpur, because he himself gave evidence that he has built at least fifty houses in this town.

As regards that part of the claim set out in paragraph (A) at the commencement of this judgment, I find that the terms of the contract between the plaintiff and defendant are as stated by the defendant. This is clear from Exhibit D. 20, which is written by defendant and was handed to the plaintiff. That exhibit is as follows :—

5% of agreed cost for making a schedule of dilapidations.
Half payable on completion of plan.
Balance when claim settled.
Supervision another 5%.

In the view that I take of this case with regard to the renovations plan, it is unnecessary for me to give any decision regarding the claim in paragraph (A) set out at the commencement of this judgment.

As regards the claim set out in paragraph (C) i.e. the claim for preparing a drawing for a water tank, I find that the plaintiff has not proved that he received specific instructions from the defendant to prepare such a drawing. Therefore that claim must fail.

This leaves outstanding the claim set out in paragraph (B) at the beginning of this judgment.

As to this the plaintiff's evidence is that the defendant instructed him to prepare plans for the following additions and alterations to the premises, and this scheme was to take the place of the scheme for

repairing the dilapidations. Those additions and alterations were as follows :—

(a) Construction on upper floor of 6 new bedrooms, each complete with bathroom and lavatory.
(b) Removal of kitchen to the other side of the premises.
(c) Installing a bathroom on the ground floor.
(d) Parquet floor for ground floor.
(e) Septic tank system.

As regards the fee it is common ground that, by custom, architects in Kuala Lumpur follow the scale of fees prescribed by law in Singapore under the Architects Ordinance, 1926, of the Straits Settlements. By that law the fee for taking a client's instructions, preparing drawings etc., for a *new* building is 7½% when the cost of the building exceeds $20,000.

In the case of alterations and additions to *existing* buildings, which is the case here, a higher percentage may be charged not exceeding twice the percentage fixed for new buildings. Therefore, the plaintiff could have fixed a fee as high as 15 %. His evidence is that he told defendant this but added that he would fix the fee at 10%.

The defendant's evidence is, as already stated, that the plaintiff agreed to accept a fee of $100 for the renovations plan, having already accepted a fee of $150 in full settlement of the plans for repairing the dilapidations. To support that evidence the defendant produced a receipt for $100 in his favour, dated 1st February, 1946, signed by the plaintiff. That receipt is as follows :—

No. 17. Feb. 1st 1946.

Received from Khoo Boo Gong, Esq., the sum of Dollars One hundred ..... being professional charges (? ? ?) for drawing plan of alterations and additions to house No. 9 Treacher Road, K.L.

$100. Sd: William Manson-Hing.

Mr. Charlesworth, for the defendant, submitted that since that receipt does not contain any limiting words such as 'on account' that it must be taken as in full settlement for preparing the alterations and additions plans.

The plaintiff denied that he received that $100 in full settlement and pointed to the question-marks in the body of that receipt which, he states, were inserted by him as indicating his contempt for the meanness of the defendant, who, according to the plaintiff, was trying to do the plaintiff out of his rightful fee and thereby get plans for next to nothing.

On this part of the case I believe the evidence of the plaintiff. I believe that he prepared those plans on the instructions of the defendant and that he informed the defendant that the fee for them would be on the aforesaid professional scale. I further believe that the plaintiff told the defendant that he, the plaintiff, was entitled to charge a fee as high as 15%, but that he would reduce that fee to 10%. Thereupon the defendant accepted the position. The plans were thus prepared; they were submitted by the plaintiff to the defendant; the defendant signed them (this is admitted by the defendant); they were then submitted to, and passed by, the Kuala Lumpur Town Board; tenders were called for to be delivered at the office of the defendant. All these matters, I find, were done with the approval and consent of the defendant who, as already stated, was well acquainted with the building trade in Kuala Lumpur.

I disbelieve the evidence of the defendant and his one witness that the plaintiff had advised the defendant that the estimated costs of these alterations and additions would be about $15,000. The witness for the defendant gave evidence that in his opinion the cost would be about $30,000. The tenders, when opened, were found to range from $26,000 to $42,000, and I cannot believe that the defendant, well acquainted with the building trade as he is, could not have known that those alterations and additions could never have been executed for the sum of $15,000.

Accordingly, on this part of the claim the plaintiff must succeed.

Before assessing the amount due to him on this part of his claim I should refer to paragraph 1 of the written statement of defence which denies that the plaintiff is, or at any material time was, an architect.

From the evidence I am satisfied that the defendant employed the plaintiff as an architect and at the material times the plaintiff was registered as an architect with the Town Board, Kuala Lumpur. He continued to be so registered until December, 1946. As to this I would make reference to my judgment of 11th August, 1947, in the case of *Manson-Hing v. Ho Ah Loke*[1].

The judgment also decides that an architect does not charge a client for two sets of plans for the same building when the design is varied.

I hold there was a variation in this case and that the plaintiff is not entitled to charge a fee for the plans prepared for repairing the dilapidations, in addition to charging a fee for preparing the plans in respect of the alterations and additions. He is only entitled to a fee in respect of the latter plans. As regards this Mr. Marjoribanks, in his closing address, admitted that the plans for the alterations and additions covered some of the ground already covered by the plans relating to repairing the dilapidations.

I find that the defendant abandoned the renovations project which, according to the architect's scale of fees, entitled the plaintiff to claim two-thirds of the fee originally fixed. Hence the plaintiff is entitled to

charge two-thirds of 10% of the estimated costs. As regards the estimated cost I take it to be that of the lowest tender, which is $26,000.

Accordingly on this part of the claim the plaintiff must succeed to the extent of 2/3rds of 10% of $26,000, which works out at $1,733.33. To this must be added the sum of $38.40, the cost of the blue prints, admitted to be due by the defendant. This makes a total of $1,771.73. Deduct from this the two amounts of $160 and $100 paid by the defendant to the plaintiff, and this leaves a final total of $1,521.73. I accordingly give judgment in favour of the plaintiff for that amount.

As regards costs, the plaintiff has succeeded in one part of his claim out of three. He will have the general costs of the suit and the defendant will have the costs of defending the claims set out at the beginning of this judgment as paragraphs (A) and (C).

The plans put in evidence in this case are as follows: — P5. and P6 — plans in respect of repairs to dilapidations; P7., P8., P9., and P12 — plans and blue print for renovations; and P16. and P17 — plan and blue print of water tank. On the authority of *Gibbon v. Pease*[2] I direct that the Registrar, Supreme Court, should hand over to the defendant all those plans, except Exhibits P16. and P17., which should be handed over to the plaintiff, after the time for appeal has expired. If the defendant does not apply to have those plans before the time for appeal has expired, and no appeal is filed, those plans also to be handed over to the plaintiff.

COURT OF APPEAL.

F. G. Charlesworth for the appellant.

N. A. Marjoribanks for the respondent.

Jobling J. : — This is an appeal against so much of the Judgment of the Chief Justice of the Federation of Malaya, Kuala Lumpur dated 31st October 1947 as decided that respondent/plaintiff was entitled to recover from the appellant/defendant the sum of $1,483.33 and the general costs of the action.

The respondent/plaintiff in the Court below claimed fees for professional services as an Architect and Civil Engineer in respect of three separate transactions. The learned Chief Justice accepted the appellant/defendant's version of two of these transactions and dismissed the claim grounded on them but accepted the respondent/plaintiff's version of the third transaction and gave judgment accordingly.

In regard to the third transaction the respondent in his Statement of Plaint claimed fees for work done but at the opening of the trial this was amended to a claim for fees due under a specific agreement between the parties.

The appellant admits the work was done by respondent but denies that it was done on his instructions. He also states that respondent agreed to accept and did accept $100 in full settlement of any claim in regard to this work.

At the trial there was little evidence other than the statements of the parties and the case turned on the credibility of the witnesses and their stories. The learned Chief Justice believed the evidence of the respondent so far as regards one of the three claims and Mr. Marjoribanks contended that such a finding of fact should not be upset by an appellate Court which had not seen and heard the witnesses. He referred to *Watt v. Thomas*[3]. In that case it was stated that the true rule is that the Court of Appeal should attach the greatest weight to the opinion of the Judge who saw the witnesses and heard their evidence and should not disturb a judgment of fact unless they are satisfied that it is unsound.

It is with this rule in mind that I approach this case.

Mr. Charlesworth for the appellant has sought to show that the respondent's evidence is not worthy of belief. He referred to the fact that the learned Chief Justice disbelieved the respondent's evidence on two of his three claims and contended there was no reason to believe his evidence on the third. On the contrary Mr. Charlesworth submitted that the conduct of the respondent clearly showed that there was good reason to disbelieve his evidence that there was a specific agreement as to the fee payable.

He based his argument on the following facts:—

1. Respondent's original Statement of claim was for fees for work done and it was only on the day of the trial that this was amended to allege a specific agreement.

2. Respondent's first bill for the fee in question dated August 1946 made no mention of any specific agreement but was based on the authorised fees for Architects for work done in preparing plans when the construction is not carried out i.e. 2/3rds of 2 x 7½% of estimated cost of construction.

3. The first letter from respondent's Solicitors to Appellant dated 22nd October 1946 makes no mention of any specific agreement.

4. The second bill for the fee which was sent by respondent's Solicitors to Appellant with their letter of 24th October 1946 also makes no mention of any agreement. It charges 10% of the estimated cost of construction.

5. Respondent accepted $100 in respect of this fee and gave a receipt which made no mention that the amount was received on account.

Certain question marks inserted in the receipt were it was suggested consistent with Appellant's story that there had been some haggling over the $100 fee before acceptance.

Mr. Marjoribanks attacked the credibility of the appellant on the score that his evidence that respondent estimated the cost of the renovations at $15,000 was highly improbable and also commented on the fact that in giving evidence regarding the payment of $150 for the plan for dilapidation made no mention that the clerk Chong Hing Choon was present. But he relied principally on the finding of fact by the learned Chief Justice.

The facts referred to by Mr. Charlesworth and set out above provide weighty reasons for examining the credibility of the respondent very closely and the difficulty I find myself in is that the learned Chief Justice does not refer to them in his judgment. Had that judgment considered those facts and in spite of them found that the respondent was a credible witness in regard to one of his claims I should probably have felt bound to defer to the finding for the reasons given in *Watt v. Thomas*[3]. But in the absence of any reference to these facts in the judgment I am left in doubt whether they were ever brought to the learned Chief Justice's notice and if they were whether they were considered by him.

In these circumstances I think the Court is free to examine the whole of the evidence in the light of the facts now brought to its notice. I give the greatest weight to the learned Chief Justice's opinion that the respondent appeared to be a credible witness but his evidence is entirely unsupported and his conduct is in my view, so inconsistent with the existence of the specific agreement that I am driven to differ from the learned Chief Justice and disbelieve the respondent's story. At the very least it is clear that he has not discharged the onus that lies upon a plaintiff of proving his claim.

I would therefore allow the appeal with costs here and in the Court below.

Laville J. : — The main ground of appeal in this case is that the learned Chief Justice made a wrong finding of fact on the evidence produced before him at the trial. It is in no way alleged that he misdirected himself in regard to the law, but that sitting as a Judge without a jury he took a wrong view of facts as disclosed by the evidence in this case.

The plaintiff/respondent sued the defendant/appellant for $2,742.54 for work done and drawings, specifications and documents prepared by him for the defendant/appellant on his instructions in regard to No. 9, Treacher Road, Kuala Lumpur. The claim was on a basis of *quantum meruit*.

The issues raised were solely those of fact, and on two issues the learned Judge found in favour of the defendant. On the main issue the learned trial Judge found in favour of the plaintiff for the sum of $1,521.73. It is against the finding of fact on this issue that the defendant now appeals.

Though the claim as originally lodged was on the basis of *quantum meruit*, the plaintiff at the trial propounded an express agreement between himself and the defendant, i.e.

(1) that on 23rd November, 1945, the defendant instructed him to prepare plans and specifications for additions and alterations to 9, Treacher Road, and that he agreed to do so at a fee of 10% of the estimated cost of additions and alterations, a fee to which the defendant agreed;

(2) that the previous agreement between himself and defendant for a schedule of dilapidations and renovation was then abandoned by the defendant and replaced by the agreement for alterations and additions;

(3) that as the agreement of 23rd November was abandoned by defendant he, plaintiff, was entitled to claim 7½% of the estimated cost, both on that agreement and the one for which it had been substituted, according to the scale of fees prevalent in Kuala Lumpur for such work.

The only evidence in regard to the terms of the agreement, the work done by him, and the breach of the agreement set up by him, is the evidence given by the plaintiff himself, and such corroboration as his alleged diary can afford.

The defendant says that late in November, 1945, plaintiff suggested additions and alterations instead of renovation to No. 9, Treacher Road. It was agreed by both parties (i) that $100 would be paid by defendant for a plan for additions and alterations, (ii) that plaintiff should supervise the work at a fee of 5% on cost, (iii) that estimated cost was to be in the neighbourhood of $15,000 and (iv) as to the renovation and dilapidation agreement it was agreed that a payment of $150 for work done on that agreement would by mutual consent settle it. The above terms were accepted by the plaintiff and he was paid $150 and $100 accordingly.

The evidence as to this is that of defendant and his witness Chong Hing Choon who supports the $15,000 limit set by defendant and the payment of $150 to close the old agreement and the payment of $100 on the new plan with the proviso for 5% supervision fee.

The learned trial Judge believed the evidence of the plaintiff that the plans for the additions and alterations were made at defendant's instructions, (2) that the plaintiff told the defendant he would charge him 10% and that defendant accepted those terms and (3) that the defendant abandoned the additions and alterations scheme without the consent of the plaintiff. He disbelieved the defendant's evidence as to an approximate cost of $15,000 being stipulated by defendant, and, by inference from his belief in plaintiff's

claim to 10%, the defendant's account of the agreement, and the story that the first agreement was abandoned by mutual consent.

The learned trial Judge gives no reason for his belief in the terms as set out by the plaintiff: from the general tenor of his judgment it seems clear that he accepted plaintiff as an architect, that the prevalent fees charged in Kuala Lumpur by architects agreed with the figure claimed by the plaintiff and were therefore such as a man in plaintiff's position would normally charge, and it would seem that the question marks in the receipt for $100 made acceptable the plaintiff's story that they were put in by plaintiff as a mark of indignation at the meanness of the defendant in not advancing a greater sum.

The defendant's story of a $15,000 limit is rejected by the learned trial Judge on the ground that the subsequent tenders ranged between $26,000 and $42,000, that defendant's own witness in cross-examination gave his estimate of probable cost at about $30,000 and that defendant was a man versed in probable cost of buildings in that he had himself, before the Japanese war, built 50 houses in Kuala Lumpur and so would be unlikely to stipulate so low a figure as $15,000. In this connection it may be said that the claim of a $15,000 limit was first set out in the further amended defence filed by defendant at the commencement of the case on 26th August 1947, but is mentioned by defendant in Ex. D21 dated 2nd December 1946 in the agreed correspondence put in.

While general probabilities may be accepted to support or attack a case, they are no safe guide unless every aspect of the evidence is clearly in accord with them. This cannot be said in regard to the plaintiff's claim here. His claim to be an architect is not beyond attack. In his evidence in chief he does not claim to be an architect or to be qualified as such but merely claims to have been registered as such by the Japanese and to have practised as such during the Japanese occupation and thereafter till December, 1946; he admits in cross-examination that he is not now entitled to be registered as an architect according to the Town Board authorities, and it is therefore a moot point as to whether plaintiff is entitled to charge fees on the scale in force for qualified architects and this detracts from the general probability that he would do so. This is further borne out by the fact that he accepted for preparing plans for the dilapidation renovations on 9th November, 1945, an agreement for 5% on estimated cost, which tends to show that at the time of the making of that agreement he did not claim remuneration at the usual architects' rates; his diary Ex. P3 bears this out, and it seems strange that at that date, if he claimed to be a fully qualified architect, he did not exact the full fee.

As to plaintiff's alleged agreement to charge 10% of estimated cost on the additions and alterations plan, according to his own evidence he was entitled to charge 15%, but says he contented himself with 10%, but his diary to which he refers in his evidence, under the date 23rd November 1945, refers not to the additions and alterations plan but to the dilapidations plan, and there is no mention therein of any agreement as to fee for the additions and alterations plan till 1st February, 1946. This again seems strange in an architect working to a schedule of professional fees, and purporting to keep a professional diary.

As to the question of the $100 payment by defendant on the additions and alterations plan being merely a payment on account and the question marks being merely a mark of indignation at the smallness of the pre-payment, again the matter is one of doubt; the form of the receipt is unconditional; it would have been easy to put in the words "in part payment", and the question marks are just as consistent with indignation at the smallness of the sum paid for the complete work as with the smallness of the sum paid in part payment.

It is my view therefore that the general probabilities which seem to support plaintiff's story are tainted by the special circumstances attaching to them in this case and cannot be whole heartedly accepted.

On a closer scrutiny of the plaintiff's evidence other discrepancies and inconsistencies appear.

The claim is based on a *quantum meruit* in the plaint but a specific agreement is set up in Court by plaintiff. There is no evidence of such an agreement in his diary — which is kept in a very careless and unintelligent way for a professional diary — and the bill tendered to defendant on 24th August, 1946 (D19) by defendant, a copy of which is among the agreed correspondence, is in the form of fees for work done and no claim is made for a specific agreement, nor does the bill attached to the plaint and marked Ex. P1. make any such claim. Plaintiff states in his evidence that when he prepared D19 he forgot that there was an agreement, a statement which it is difficult to believe from a professional man, especially as the lapse of memory appears to have continued till the actual hearing of the case. This is further borne out by the fact that plaintiff's solicitor in his first letter to defendant dated 22nd October, 1946, referring to a bill for $3,350.88 claims it due as fees for work done and makes no mention of an agreement, nor is the copy of the bill attached to his solicitor's reply of 24th October 1946 an exact copy of the bill dated 24th

August which is referred to in the letter of 22nd October, 1946. It will be seen therefore that no agreement is set up by plaintiff till the case is on trial, and that the fees claimed originally by plaintiff are in the bill of 24th August estimated as 2/3rd of the full 15% payable for the abandonment of an additions and alterations plan, though plaintiff's evidence is that he agreed to let defendant off with 10% in place of 15% : in the copy of the bill attached to plaintiff's letter on 24th October, 1946, the same sum is claimed as 10%, i.e. the full sum due by defendant on a 10% agreement; and finally in Court the claim is reduced to 2/3rd of this 10% because the work was abandoned.

In view of all this it is difficult to resist the conclusion that there was no agreement by the defendant to pay any agreed professional fees.

The receipt for $100 I have already commented on. Whatever indignant question marks it contains, it is a clear and unequivocal acknowledgment of payment for drawing a plan of alterations and additions to No. 9, Treacher Road, with nothing to show that it was a part payment or conditional payment. This supports the defendant's story that he made payments of fixed sums for the two sets of plans.

The defendant's story is consistent in all respects. In regard to the dilapidations he agreed to pay 5% on costs : this is evidenced by the agreement produced by the plaintiff and accepted by the learned trial Judge. He paid $150 for the plans, and, though plaintiff claims that the receipt Ex. P10 is not an unequivocal acceptance of that sum, the wording thereof is ambiguous and no mention of payment on account is entered in his diary which simply states "Gave tracing ..... Received $150".

It is reasonable to suppose that when the plan for alterations and additions was being mooted defendant would seek to follow a similar method : a payment for plans and payment by a similar percentage on cost. That is the story told by defendant; it is borne out by his witness Chong Hing Choon who was not discredited in cross-examination. The defendant's story was attacked because it was said that the limit of about $15,000 cost which he stipulated seemed for the times an impossibly low figure for a man versed in the building trade to set. This was borne out by the fact that the lowest tender was $26,000, and it was also agreed that the question of a limit of $15,000 was not pleaded by defendant till very late in the proceedings.

This sum is mentioned by defendant first in a document dated 2nd December 1946 (vide D21); it is supported by the evidence of his witness and by his own evidence that it was an approximate figure and the reason given that he could not be extravagant with trust money was not attacked.

In regard to this, the evidence of the plaintiff is that defendant made no stipulation of any kind as to the cost of the proposed additions and alterations but told him to go ahead. It is hard to believe that, at a time when it was common knowledge that all Japanese money was valueless and when it was quite uncertain what the costs of materials would be, a man with experience of the building trade would give *carte blanche* to an architect in such a way. It is, in my opinion, more likely that basing his estimates on pre war rates he would tend to underestimate costs, but he would not when the risks and *imponderabilia* were so much greater abandon all caution in respect of costs as is alleged by the plaintiff. It seems to me that the same considerations apply to the question of whether any provision was made as to abandonment of the idea of alterations and additions, and that the whole question of what remuneration the plaintiff would get beyond a plan fee depended on whether the plan could from the financial point of view be proceeded with, and that any business man would protect himself by stipulating that no further fee would be payable unless the project was actually put in hand.

It is laid down in *Watt v. Thomas*[3] that when a question of fact is tried by a Judge without a jury, and no question of misdirection on law is suggested, the appellate Court, in view of the advantage enjoyed by the Court of trial in seeing and hearing the witnesses giving their evidence and so being able to add to or subtract from the credibility to be given to them, should not reverse the decision of such a Court on fact unless that decision is clearly unsatisfactory, but that judgment also states that an appellate Court is free to reverse the conclusions of a trial Court if the grounds on which it has reached them are inconsistent or inaccurate or if the weight and bearing of circumstances admitted or proved have clearly not been fully appreciated.

The learned trial Judge has given in his judgment in this case no reasons for his belief in the evidence of the plaintiff rather than that of the defendant and has made no comment or note, as section 205 of the Civil Procedure Code allows him to do, in regard to the demeanour of the witnesses which might have moved him to give credence to the plaintiff rather than the defendant on the main issue; on two other issues in the trial he has disbelieved the plaintiff's story.

In my opinion the weight and bearing of the circumstances proved by the evidence or admitted by the parties is such that the *onus* thrown on the plaintiff of proving his case has not been discharged and that

he therefore cannot succeed. For these reasons, I am of opinion that the appeal should be allowed and the judgment of the lower Court be reversed with costs to the defendant/appellant here and in the Court below.

Russell J. : — The issues in this case before the learned trial Judge were all issues of fact and this appeal is brought solely on the grounds that the findings of fact were against the weight of evidence, there being no suggestion that the Judge misdirected himself in law.

In the case of *Watt or Thomas v. Thomas*[3] the House of Lords laid down the principles on which an appellate court should act when an appeal is against the finding of fact by a trial Judge.

The head-note of this case reads as follows:—

When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.

The plaintiff-respondent claimed as an architect a sum of $2,742 and some cents for plans prepared by him in respect of a dwelling-house No. 9, Treacher Road, Kuala Lumpur, and his claim was made up as follows:—

(a) a fee for making a schedule of dilapidations and providing a drawing.
(b) a fee for preparing a drawing relating to renovations.
(c) a fee for preparing a drawing for a concrete water tank.

As regards paragraph (c) the learned trial Judge found that the plaintiff-respondent failed to prove that he had received the defendant-appellant's instructions to prepare the drawing and this part of the claim was dismissed.

As regards paragraph (a) the learned trial Judge found the terms of the agreement were as stated by the defendant-appellant and in view of his finding with regard to paragraph (b) held that it was unnecessary to give any decision as regards this paragraph of the claim.

Under paragraph (b) the plaintiff-respondent alleged that he was engaged to prepare a plan in respect of renovations at a fee of 10% of the estimated cost and that the defendant-appellant having agreed to and signed the plan which was duly passed by the Town Board then abandoned the renovation project. He therefore claimed two-thirds of the fee on abandonment in accordance with an architect's scale of fees.

The defendant-appellant admitted that he had agreed to the plan for renovation but said that the sum he agreed to pay for the plan was $100 and no more and a further fee of 5% of the cost of the work if the plaintiff-respondent supervised the same. He also said that it was an implied condition that the renovations should only be proceeded with if they were capable of being completed for a sum of about $15,000, which sum he said the plaintiff-respondent represented as being the probable cost. He further said the plaintiff-respondent later agreed that the renovations should be indefinitely postponed.

It was admitted tenders were in fact called for and were found to range from $26,000 to $42,000.

The learned trial Judge found as a fact that there was an oral agreement as alleged by the plaintiff-respondent and he gave judgment for him for two-thirds of 10% of the lowest tender, $26,000.

Although an appellate Court should attach the greatest weight to the opinion of the Judge who saw the witnesses and heard their evidence, it is the duty of an appellate Court to check by critical examination of the whole of the evidence the findings of the trial Judge as to the truthfulness of the witnesses.

In so examining the evidence I think it appears unmistakably from the document D19 dated August 26, 1946 which the plaintiff-respondent disclosed as item 1 in his affidavit of documents and which is his first draft of the bill submitted to the defendant-appellant that at that time the plaintiff-respondent was not alleging any oral agreement to pay 10% of the estimated cost. His explanation of this document in cross-examination was that when he prepared D19 he forgot that the job was an alterations job not a new one and that he had temporarily forgotten there was a 10% agreement. I cannot believe this explanation and I think the learned trial Judge failed to appreciate the weight of this documentary evidence to which he does not refer.

I therefore think it is open to this Court on the authority of the case cited above to reverse his conclusions although this Court has not had the advantage of having seen and heard the witnesses.

It is also to be noted that the claim was based on a *quantum meruit* and it was not until his counsel opened his case in court that there was any indication that he intended to put forward an express agreement to pay 10%.

The learned trial Judge gave no reasons as to why he believed the plaintiff-respondent's evidence as to the

details of the oral agreement in preference to the evidence of the defendant-appellant and his one witness save that he said:—

> I disbelieve the evidence of the defendant and his one witness that the plaintiff had advised the defendant that the estimated costs of these alterations and additions would be about $15,000. The witness for the defendant gave evidence that in his opinion the cost would be about $30,000. The tenders, when opened, were found to range from $26,000 to $42,000, and I cannot believe that the defendant, well acquainted with the building trade as he is, could not have known that those alterations and additions could never have been executed for the sum of $15,000.

The plaintiff-respondent stated he never gave an estimate in respect of the renovations, although he admitted doing so in respect of his claims under paragraphs (a) and (c). He admitted making a charge in respect of an estimate for the renovations and then had to admit he had made a charge for something he did not do. I think he told the defendant-appellant that the cost of renovating the whole building would be approximately $15,000. The defendant-appellant may have been well acquainted with the building trade but in the last quarter of 1945 times were exceptional, particularly as appears from the evidence of the plaintiff-respondent himself building materials were not then on sale in the shops. Furthermore, the defendant-appellant first mentioned this sum in a statement dated 2nd of December, 1946, although the limit of this amount was not pleaded by him until he filed his further amended defence.

The agreement as alleged by the plaintiff-respondent was not corroborated by any document. The receipt for $100 dated February 1, 1946 does not seem to me to be conclusive either way. It is to be noted on behalf of the defendant-appellant that it does not contain any limiting words such as "on account" and on behalf of the plaintiff-respondent that it contains a number of question marks in the body of the receipt indicating that the plaintiff-respondent would appear to have been dissatisfied with the amount received.

The diary produced by the plaintiff-respondent could hardly be called a professional diary and it is of no value whatsoever as independent corroboration of the evidence of the person who produced it.

Having rejected the terms of the express agreement as alleged by the plaintiff-respondent on the grounds that it appears that it was in the nature of an after thought and on the grounds that the plaintiff-respondent said that he had forgotten about the agreement to pay 10% when he made out his bill although he tried to make the Court believe from his diary that he had been aware for some months that the defendant-appellant was trying to manoeuvre him out of his 10% one is driven inevitably to the conclusion that the defendant-appellant and his witness were speaking the truth as to the details of the express agreement.

I would therefore allow this appeal and give judgment for the defendant-appellant with costs here and in the Court below.

Appeal allowed.

TOH SENG CHOR & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Willan C.J.) August 20, 1948]

[K. L. — Magistrate Criminal Appeal No. 32 of 1948]

Criminal Procedure Code (Cap. 6), s. 73 — Bond to keep the peace — Enquiry into the truth of information necessary — Voluntarily causing hurt — Penal Code, s. 323.

In this case the four appellants were charged with voluntarily causing hurt, and the first three were convicted, sentenced to varying terms of imprisonment, and, in addition, bound over to keep the peace. The fourth appellant was discharged but immediately on his discharge the Magistrate called upon him to show cause why he should not execute a bond to keep the peace. The Magistrate did not hear any evidence but ordered the accused to execute a bond to keep the peace as "he is suspected by the complainant of being concerned in the assault."

Held: under s. 73 of the Criminal Procedure Code the Magistrate should have enquired into the truth of the information on which he acted before making the order to execute the bond and, as he had failed to do so, the appeal in this case must be allowed.

MAGISTRATE'S CRIMINAL APPEAL.

P. P. Nair for 1st, 2nd and 3rd appellants.

M. N. Cumarasami for the 4th appellant.

W. Buhagiar (D. P. P.) for Public Prosecutor.

Willan C.J.: — In this case the four appellants were charged under section 323 of the Penal Code with voluntarily causing hurt to the complainant, another Chinese. The first three appellants were convicted, sentenced to varying terms of imprisonment and, in addition, bound over to keep the peace.

There is ample evidence on the record to support their convictions, and there are no grounds for interfering with the sentence. Accordingly the appeals of the first three appellants are dismissed.